

Fordham Urban Law Journal

Volume 28 | Number 3

Article 5

2011

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Recommended Citation

Suzanne D'Amico, *INHERENTLY FEMALE CASES OF CHILD ABUSE AND NEGLECT: A GENDER-NEUTRAL ANALYSIS*, 28 Fordham Urb. L.J. 855 (2001).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol28/iss3/5>

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Cover Page Footnote

J.D. Candidate, Fordham University School of Law, 2001; B.A., Speech Pathology, magna cum laude, Loyola College, 1998. I would like to thank Professor Deborah Denno for her assistance with this project.

INHERENTLY FEMALE CASES OF CHILD ABUSE AND NEGLECT: A GENDER-NEUTRAL ANALYSIS

Suzanne D'Amico*

INTRODUCTION

Scenario 1: Imagine being nineteen years-old, on welfare, and giving birth to a son. Imagine your son died as a result of your inability to breastfeed adequately. Now imagine the state is prosecuting you for killing the child.

Scenario 2: Imagine a woman, so disenchanted by her role as mother that she cruelly punished her newborn son by denying him his only source of nourishment—her breastmilk. Imagine a two-month-old infant, his skin dangling from his frail body because his mother failed to feed him. Now imagine the state is prosecuting her for killing the child.

These two extremely different portrayals both were used to describe Tabitha Walrond, a young mother found guilty of criminally negligent homicide after her two-month-old son died from malnutrition.¹ Her case was unusual because while it is rare for a baby to die as a result of a woman's inability to produce enough breastmilk to adequately nourish a child, it is even more rare for a woman to be prosecuted for such conduct.²

The decision whether or not to prosecute this case was extremely controversial,³ with compelling arguments on both sides. However, this Comment will not analyze the decision to prosecute. Rather, this Comment will examine how the portrayal of Ms. Walrond by

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1. Nina Bernstein, *Placing the Blame in an Infant's Death; Mother Faces Trial After Baby Dies from Lack of Breast Milk*, N.Y. TIMES, Mar. 15, 1999, at B1.

2. *Id.*

3. Compare Editorial, *Breast-Feeding as Manslaughter*, N.Y. TIMES, Mar. 16, 1999, at A26 (stating that "[e]xpert testimony on how difficult it is for many nursing mothers to recognize the danger signs by themselves and evidence that the medical system let this young woman down suggest that this is not a case that should be prosecuted."), with Editorial, *Breast-Feeding Myth*, N.Y. TIMES, Mar. 17, 1999, at A20 (suggesting that it is a myth that it is difficult to measure the nourishment of a breast-fed baby).

the defense and prosecution, and in the media, reflects gender stereotypes in the criminal law and society.

The prosecution depicted Ms. Walrond as a woman scorned by the father of her son, as someone who attempted to have an abortion to prevent having a child, and as an individual who simply rejected motherhood—a bad mother.⁴ In contrast, the defense portrayed her as a good mother who was simply a victim of circumstance, failed by her family, the medical system, and society.⁵ Ms. Walrond's unique circumstances and conduct challenged traditional conceptions of female roles because they did not fit neatly within the good mother/bad mother dichotomy of motherhood.

Although courts are constantly confronted with mothers who have harmed their own children, some cases are unusual.⁶ For example, one scenario to emerge in recent years is the situation of women who are prosecuted for exposing their infants to drugs in utero.⁷ Cases such as these and that of Tabitha Walrond present an even greater challenge to the criminal justice system because these offenses are "inherently female" in that only females can perpetrate these crimes, yet these crimes are so reprehensible that they completely contradict society's feminine ideal of women as docile, passive caregivers.⁸

Relying upon traditional conceptions of female roles like the ones used by the attorneys in the case and by the media to portray Ms. Walrond does a disservice to all parties involved in these prosecutions. It forces upon the defendant the role of either good mother or bad mother. Once she is so labeled, both judge and jury view her as such, frequently ignoring her specific situation. Similarly, the prosecutor is constrained by such stereotypes in that the defendant may be treated either too harshly or too leniently simply

4. Nina Bernstein, *Trial Begins for Mother in Breast-Fed Infant's Starvation Death*, N.Y. TIMES, Apr. 28, 1999, at B7.

5. *Id.*

6. See generally JACK C. WESTMAN, LICENSING PARENTS: CAN WE PREVENT CHILD ABUSE AND NEGLECT? (1994) (discussing the frequency of incompetent parenting in our society and situations of mothers harming their own children).

7. See generally Kary Moss, *Substance Abuse During Pregnancy*, 13 HARV. WOMEN'S L.J. 278 (1990) (discussing the incidence of in utero drug exposure receiving nationwide attention from the media, the judicial system, and the legislature).

8. Although male child abuse offenders are prosecuted, society accepts some level of male violence as normal, while it more heavily stigmatizes female offenders. E.g., Dorothy E. Roberts, *Motherhood and Crime*, 79 IOWA L. REV. 95, 137 (1993) ("[M]ale criminologists who studied gangs in the United States and Britain over the past forty years 'vicariously identified' with the delinquent boys, romanticizing their deviance. Female criminologists have shown little affinity toward their female criminal subjects.") (citations omitted).

because of what she represents, as opposed to what she actually has done.

This Comment presents a gender-neutral approach to dealing with child abuse offenders. The treatment women receive in the criminal justice system is often based more on who they are and what they represent in society, than on their conduct.⁹ The woman who does not fit the traditional role of woman and mother is treated harshly by the court, the media, and society; the woman who fits the role of ideal mother is treated more leniently.¹⁰ If the offense alone were considered and not the gender of the offender, a more fair application of child abuse laws would result. This approach, however, runs the risk of ignoring the uniqueness of a woman's situation in child abuse cases. Therefore, completely eliminating consideration of gender characteristics may not be the most desirable approach to such inherently female cases. This Comment will propose ways to balance this conflict.

Part I of this Comment introduces child abuse offenses that can be committed only by women and examines the legal basis for prosecuting those offenses. Part II discusses cases of offenses by men that are analogous to the female offenses and compares characteristics of male and female child abusers. Part III argues that stereotypes stemming from the social perception of parenthood are pervasive throughout the justice system, creating a disparity in the treatment of male and female offenders. This Comment concludes that a gender-neutral approach to prosecuting child abuse cases, particularly the inherently female offenses, would alleviate this disparity.

I. INHERENTLY FEMALE CHILD ABUSE OFFENSES

A. Abuse and Neglect in the Context of Breastfeeding

The Walrond case is an extremely rare instance of a mother being prosecuted for her failure to adequately breastfeed her newborn son.¹¹ Until this case, breastfeeding issues in the law were raised primarily in the family law setting.¹² Cases arose in the con-

9. *Id.* at 107.

10. Marie Ashe & Naomi R. Cahn, *Child Abuse: A Problem for Feminist Theory*, 2 TEX. J. WOMEN & L. 75, 99 (1993) ("Mothering is taken out of its context in abuse prosecution and is judged by a judiciary that assumes middle-class, sexist, and racist norms. Mothers—across classes and cultures—are expected to perform in ways that satisfy those norms.").

11. Bernstein, *supra* note 1, at B1.

12. ELIZABETH N. BALDWIN, BREASTFEEDING AND THE LAW, at <http://www.lalecheleague.org/LawMain.html> (last visited Mar. 30, 2000).

texts of custody and visitation, public breastfeeding, employment, and whether breastfeeding is grounds for exemption from jury duty.¹³

The role of breastfeeding in the criminal law had received attention from the legal community in recent years only in the context of "extended" breastfeeding as a possible form of abuse.¹⁴ However, those cases have not resulted in findings of abuse or neglect.¹⁵ Before the case of Tabitha Walrond, inadequate breastfeeding had never been found to be the sole cause of abuse and neglect except in situations where mothers used controlled substances while breastfeeding.¹⁶ For example, in California, two mothers were prosecuted when their babies died with amphetamines in their systems—the drugs having been transmitted through breastmilk.¹⁷ Although evidence did not show exposure to amphetamines to be the cause of either death, both mothers were found guilty of child endangerment.¹⁸ Critics of these cases cite them as part of the "legal trend to punish mothers with substance abuse problems rather than get them the help they need while pregnant or after they give birth."¹⁹

The recent trend toward treating breastfeeding as an issue in the criminal law stems from the vast amount of research in support of the health benefits associated with breastfeeding. The United States government, the United Nations, and the World Health Organization all have recognized the benefits of breastfeeding.²⁰

13. *Id.*

14. ELIZABETH BALDWIN, EXTENDED BREASTFEEDING AND THE LAW, at <http://www.lalecheleague.org/LawExtended.html> (last visited Mar. 30, 2000). This issue exists when social service agencies determine mothers who breastfeed their children up to six, seven, or eight years of age abusive. *Id.*

15. *Id.*

16. Corey Silberstein Shdaimah, *Why Breastfeeding is (Also) A Legal Issue*, 10 HASTINGS WOMEN'S L.J. 409, 427-28 (1999).

17. ELIZABETH N. BALDWIN, A BRIEF SUMMARY OF BREASTFEEDING AND THE LAW, at <http://www.lalecheleague.org/LawBF.html> (last visited Mar. 30, 2000).

18. *Id.*

19. *Id.*

20. Shdaimah, *supra* note 16, at 430-37. In the 1970s Congress developed the Special Supplemental Nutrition Program for Woman, Infants, and Children (WIC). *Id.* This program allocates federal funds to the states to be used for supplemental nutrition for children under the age of five, pregnant women postpartum who breastfeed for one year, and postpartum mothers who do not breastfeed for up to six months. *Id.* The World Health Organization has adopted a number of resolutions that declare breastfeeding as the optimal and exclusive source of infant nutrition throughout the first six weeks of life. *Id.* In 1989, the United Nations General Assembly recognized the health advantages to breastfeeding when it adopted The Convention on the Rights of the Child. *Id.*

Breastfeeding has been shown to benefit babies, mothers, fathers, and society in general.²¹ According to the American Academy of Pediatrics, "Extensive research, especially in recent years, documents diverse and compelling advantages to infants, mothers, families, and society from breastfeeding and the use of human milk for infant feeding. These include health, nutritional, immunologic, developmental, psychological, social, economic, and environmental benefits."²² Research has shown that babies who are breastfed have "better immune protection, better neurological development, higher IQs and decreased incidence in Sudden Infant Death Syndrome, intestinal disorders (pediatric and adult), juvenile diabetes, childhood cancers, and allergies."²³

Breastfeeding benefits women in that it is associated with a reduced incidence of breast cancer, osteoporosis, diabetes, and delayed return to fertility.²⁴ These medical benefits result in a reduction of medical expenses and employee absenteeism.²⁵ Fathers also benefit due to the breastfeeding of their children by paying lower medical costs, knowing that their infants will "receive the best start in life intellectually, socially, and emotionally," and from the strong bonds infants learn to develop through breastfeeding.²⁶

Aside from the medical research recognizing benefits of breastfeeding, courts and legislatures have recognized the choice to breastfeed as an extension of the choice to have children.²⁷ The New York legislature has recognized the right of a mother to breastfeed as a civil right, in that it is "the most basic act of nurture between mother and baby."²⁸

In *Board of Directors v. Rossetti*,²⁹ the Supreme Court of Pennsylvania became one of the first courts to address the issue of a woman's right to breastfeed. Although this case concerned the de-

21. Kristen D. Hofheimer, *Breastfeeding as a Factor in Child Custody and Visitation Decisions*, 5 VA. J. SOC. POL'Y & L. 433, 435-47 (1998). By extension, even society reaps the benefits of breastfeeding through reduced medical costs associated by the reduced health risks of babies who are breastfed. *Id.* at 447.

22. Shdaimah, *supra* note 16, at 22 n.4.

23. *Id.* at 409 (citations omitted).

24. *Id.* at 411.

25. *Id.*

26. Hofheimer, *supra* note 21, at 446-47.

27. E.g., *Dike v. United States*, 650 F.2d 783, 787 (5th Cir. 1981) (recognizing that breastfeeding is a right inherent in parental care). *But see* *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997) (stating that the Ninth and Fourteenth Amendments deserve strict protection free from undue interference).

28. N.Y. CIV. RIGHTS LAW § 79(e) (McKinney 1999).

29. *Rossetti*, 411 A.2d 486, 488-89 (Pa. 1979) (upholding the school board's denial of discretionary leave to a teacher who chose to breastfeed her allergy prone child).

nial of a mother's right to breastfeed her child during the workday, it is significant because it brought this inherently female issue to the forefront of discussion. The court explained that a similarly situated male teacher would have received the same treatment by the school.³⁰ However, as noted in the dissent, "[T]he majority contends that appellee has been treated no differently than any male teacher . . . [t]his position ignores the obvious reality that only women can perform the breastfeeding function . . . [and] is discriminat[ory] on the basis of sex."³¹

*Dike v. School Board*³² also recognized a woman's right to breastfeed. The *Dike* court found breastfeeding to be protected under the Ninth and Fourteenth Amendments of the Constitution.³³

Breastfeeding is the most elemental form of parental care. It is communion between mother and child that, like marriage, is 'intimate to the degree of being sacred' In light of the spectrum of interests that the Supreme Court has held specially protected we conclude that the constitution protects from excessive state interference a woman's decision respecting breastfeeding her child.³⁴

Thus, under the *Dike* court's reasoning, the mother has a constitutional right to breastfeed free from undue state interference; however, this unique right imposes unique duties. Generally, the breastfeeding mother is the exclusive provider of nourishment to her child. Additionally, medical research shows that breastfeeding hormonally links mother to child.³⁵ Research has demonstrated that "[a] breastfeeding mother . . . has a biologically programmed advantage over a bottlefeeding mother or caregiver with regard to responsiveness to attachment behaviors."³⁶ Such research con-

30. *Id.* at 489.

31. *Id.* at 489-90 (Roberts, J., dissenting) (internal quotation omitted).

32. *Dike*, 650 F.2d at 785.

33. *Dike*, 650 F.2d at 786-87. Although *Shahar* later overruled the *Dike* Court's application of a strict scrutiny standard to family choices in the employment context in the 11th Circuit, the court discusses in depth the choice to breastfeed. *Id.* *Shahar* did not deal specifically with the issue of breastfeeding, but it dealt with the same amendments as *Dike*. *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997); see also Shdaimah, *supra* note 16, at 420 (discussing the *Dike* analysis).

34. Shdaimah, *supra* note 16, at 420 (citation omitted).

35. Hofheimer, *supra* note 21, at 440 ("Research on hormones released during lactation reveals an intricate 'mother-infant physiologic interdependency' that reinforces maternal care for infants and children . . . hormones released during lactation enhance mothering behavior and reinforce bonding between mother and child.").

36. *Id.* at 445.

tends that breastfeeding mothers are more responsive than bottle feeding mothers to satiety cues.³⁷

B. In Utero Drug Exposure

Another example of an inherently female child abuse offense is drug addicted pregnancy. The prosecution of mothers who were addicted to illegal drugs during pregnancy emerged during the late 1980s and early 1990s.³⁸ In 1989, Florida became the first state to prosecute a mother for exposing her child to drugs in utero.³⁹ Jennifer Johnson was arrested and convicted pursuant to a Florida statute that made delivery of drugs to a minor illegal.⁴⁰ The prosecution argued that during the seconds immediately following the birth, but before the umbilical cord was cut, drugs passed from mother to child via the cord.⁴¹ Ms. Johnson was sentenced to a fifteen-year counseling program that included probation, drug rehabilitation, educational requirements, and mandatory prenatal care if she were ever to become pregnant again.⁴²

The prosecution of a woman for her behavior during pregnancy is controversial because such action places the woman's rights in opposition to, and often secondary to, those of the fetus.⁴³ Furthermore, the statutory authority of these prosecutions is questionable because these cases often are prosecuted under state laws drafted to protect children rather than fetuses.⁴⁴ From the 1973 decision *Roe v. Wade*⁴⁵ to the present, no court has granted to a fetus throughout all stages of the pregnancy, the same Fourteenth Amendment rights as a person.

The Supreme Court attempted to balance the interests of the fetus and the mother in both *Roe v. Wade*⁴⁶ and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁴⁷ Although both decisions

37. *Id.* at 446.

38. Moss, *supra* note 7, at 278.

39. *Id.* at 280.

40. Moss, *supra* note 7, at 280; FLA. STAT. ANN. § 893.13 (West 2000) ("[I]t is unlawful for any person 18 years of age or older to deliver any controlled substance to a person under the age of 18 years.").

41. Moss, *supra* note 7, at 280-81.

42. *Id.*

43. See generally Lorraine Schmall, *Addicted Pregnancy as a Sex Crime*, 13 N. ILL. U. L. REV. 263 (1993) (discussing the legal implications of drug use during pregnancy).

44. See Moss, *supra* note 7, at 285.

45. 410 U.S. 113 (1973).

46. *Id.* at 150.

47. 505 U.S. 833 (1992).

focus upon a woman's right to an abortion, they are relevant to the issue of in utero drug exposure because of their detailed discussions of the rights of the mother in relation to the fetus and the issue of viability.⁴⁸

In both decisions, the Court tried to define when the interest of the fetus, or potential life, superseded that of the mother sufficiently to justify state involvement in the pregnancy. The Court in *Roe v. Wade* recognized, as applied to abortion:

[A] legitimate state interest . . . need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth . . . as long as at least potential life is involved, the State may assert interests beyond the protection of the pregnant woman alone.⁴⁹

That state interest becomes one of "protecting prenatal life."⁵⁰ In abortion decisions, the issue of when a fetus can be legally aborted and when the state can prevent termination of the pregnancy is an issue of viability. A fetus is considered viable when there is a realistic possibility of its maintaining independent existence outside the womb.⁵¹

Viability does not aid the analysis of in utero drug exposure cases because it is not as easy to determine the boundaries of viability when the issue is harm inflicted on the fetus rather than a termination of the pregnancy.⁵² When a baby is born with complications from drug exposure, it is difficult to ascertain when this exposure occurred.⁵³ In addition, the harm incurred by the baby does not necessarily occur after viability, but rather whenever the baby is exposed to drugs during the pregnancy. Therefore, from the moment of conception, the state's interest in the potential life places the rights of the fetus in opposition to those of the mother.⁵⁴

48. *Roe*, 410 U.S. at 150-51; see also *Casey*, 505 U.S. at 870 (stating that viability is the point of fetal development where the fetus may exist apart from the womb, and that, for this reason, a woman's right to terminate the pregnancy may be restricted after viability).

49. *Roe*, 410 U.S. at 150-51.

50. *Roe*, 410 U.S. at 150-51; see also *Casey*, 505 U.S. at 870 (asserting that "[t]he state has a legitimate interest in promoting the life of the unborn").

51. *Casey*, 505 U.S. at 870.

52. Michelle Oberman, *Sex, Drugs, Pregnancy, and the Law: Rethinking the Problems of Pregnant Women Who Use Drugs*, 43 HASTINGS L.J. 505, 529-30 (1992).

53. See, e.g., *Wade-Greaux v. Whitehall Labs.*, 874 F. Supp. 1441 (D. V.I. 1994) (discussing the difficulty in determining precisely when and how harm from in utero drug exposure occurred).

54. *Id.*

Fetal rights in situations of in utero drug exposure can be distinguished from those in cases of abortion. Because the right to use illegal substances is not a compelling interest, it is difficult to justify drug use as protected activity under the same rationales as a woman's right to have an abortion.⁵⁵ Therefore, at no time during the pregnancy does the mother have the legal right to put her child at risk by using illegal drugs. Indeed, some state statutes criminalize mothers exposing their babies to alcohol in utero.⁵⁶ Though using alcohol is not a compelling right, it is not illegal to do so, and yet, these statutes regulate a woman's legal activity during every stage of her pregnancy.⁵⁷

Another constitutional issue arising from prosecuting mothers with drug addictions is that in these cases women are prosecuted for the condition of being pregnant and being addicted to drugs, rather than the discrete act of taking a drug. This violates the Due Process Clause of the Fourteenth Amendment, because both pregnancy and addiction are conditions, and not independent illegal acts.⁵⁸

According to the current system in several states, mothers are prosecuted when a baby is born with effects of drug exposure that could have occurred anytime during the pregnancy.⁵⁹ Often this determination of exposure and effects is based upon a drug test performed on either the mother or baby just after birth.⁶⁰ This is particularly controversial because it requires medical professionals to perform drug tests of their patients, and, subsequently, to report the results to law enforcement authorities. This raises issues of selective enforcement and doctor-patient confidentiality and is currently under scrutiny by the Supreme Court.⁶¹

States take varying approaches to prosecuting such cases, in terms of both the windows of time they use for prosecution (for the

55. Caroline S. Palmer, *The Risks of State Intervention in Preventing Prenatal Alcohol Abuse and the Viability of an Inclusive Approach: Arguments for Limiting Punitive and Coercive Prenatal Alcohol Abuse Legislation in Minnesota*, 10 HASTINGS WOMEN'S L.J. 287, 309 (1999) (arguing that "[t]here is no fundamental right to use alcohol or drugs during pregnancy; these actions endanger both the fetus and the mother and implicate the state's interest in protecting both").

56. *E.g.*, MINN. STAT. ANN. § 626.556 (1983).

57. *Id.*

58. *Robinson v. California*, 370 U.S. 660 (1962) (striking down California statute which made it a criminal offense to be addicted to illegal narcotics).

59. *E.g.*, MINN. STAT. ANN. § 626.556 (1983); TENN. CODE ANN. § 33-8-104 (1984).

60. *E.g.*, MINN. STAT. ANN. § 626.556 (1983).

61. Gaylord Shaw, *High Court Reviews Drug Tests*, NEWSDAY, Oct. 5, 2000, at A23.

presence of drugs before or after birth), and to the theories under which they prosecute. Rather than simply testing for drugs in the baby's system at birth, some state statutes extend the window for prosecution to when the baby shows effects of drug exposure following birth. These windows can range from one week after birth until one year after birth.⁶² Generally, courts feel safer ruling on the harm in utero drugs will likely cause the child, than on the harm already inflicted upon the fetus.⁶³ Recently, the Ohio Supreme Court found a woman whose child was injured in utero by drugs liable for the injury, not because the fetus had rights in utero, but because of the potential harm likely to be incurred by the child later.⁶⁴ Indeed, children exposed to drugs in utero often exhibit physical, intellectual, and social developmental deficits throughout their lives; they also face the day to day dangers of living with a drug addicted parent.⁶⁵

Opponents of the decisions in these cases argue that testing positive for drugs once during pregnancy should not determine a woman's fitness as a parent.⁶⁶ Additionally, they criticize states using a finding of in utero drug exposure as a presumption of neglect.⁶⁷ In *Department of Social Services v. Felicia B.*,⁶⁸ the New York Court of Appeals found a mother's *past* drug use an indicator of *present* harm to the newborn. This is particularly problematic because it assumes that only a mother may inflict the harm of neglect and abuse.⁶⁹

Although many disagree with finding mothers liable for drug use while pregnant, research indicates that in most situations a fetus exposed to drugs in utero suffers irreparable harm.⁷⁰ The harm to the fetus that results from drug use during pregnancy is substan-

62. Compare MINN. STAT. ANN. § 626.556 (1983) (extending the window of prosecution to whether the baby shows signs of exposure during the first year of life), with VA. STAT. ANN. § 63.1-248.3 (1975) (extending the window of prosecution to whether the baby shows signs of exposure during the first seven days of life).

63. Louise Marlane Chan, *S.O.S. From the Womb: A Call for New York Legislation Criminalizing Drug Use During Pregnancy*, 21 FORDHAM URB. L.J. 199, 210-211 (1993).

64. *In re Baby Boy Blackshear*, 736 N.E.2d 462 (Ohio 2000).

65. *E.g.*, WESTMAN, *supra* note 6, at 76-77.

66. *See* Oberman, *supra* note 52, at 521, 538.

67. *Id.* at 539.

68. 543 N.Y.S.2d 637 (N.Y. Fam. Ct. 1989).

69. *See* Oberman, *supra* note 52, at 538.

70. *E.g.*, L.S. Prichep et al., *Quantitative EEG Characteristics of Children Exposed In Utero to Cocaine*, 1995 ELSEVIER SCIENCE B.V. 166 (1995) (discussing a study revealing significant brain dysfunction in school age children who were exposed to crack cocaine in utero).

tial.⁷¹ Annually, more than four percent of babies born in the United States have been exposed to drugs in utero.⁷² Exposure to drugs like crack cocaine in utero often results in physical problems including "brain damage, seizures, malformations, and respiratory and neurological abnormalities."⁷³ In addition, children exposed to drugs in utero experience psychological and behavioral conditions including hyperactivity, hypersensitivity to touch, and concentration and learning problems.⁷⁴ Supporters of prosecution for these cases agree that although only females may be prosecuted, this is not discriminatory because females are the sole perpetrators of this crime.⁷⁵

C. Possible Liability for HIV Transmission

In 1992, the Centers for Disease Control estimated that there were 10,000 children infected with Human Immunodeficiency Virus (HIV) in the United States.⁷⁶ Mothers who are pregnant and have HIV are at significant risk for passing the virus to their children during pregnancy or delivery, or after delivery through breastfeeding.⁷⁷ There is an estimated thirty percent to fifty percent likelihood that a mother with HIV will pass it along to her child.⁷⁸

The effect of laws criminalizing mother to fetus transmission of HIV is a hotly debated topic.⁷⁹ Although most state statutes do not explicitly address exposure or transmission from mother to child, several have enacted legislation to criminalize the choice of an HIV-infected woman to have a child.⁸⁰ Rather than explicit

71. *Id.*

72. WESTMAN, *supra* note 6, at 76.

73. Chan, *supra* note 63, at 201.

74. WESTMAN, *supra* note 6, at 77.

75. WESTMAN, *supra* note 6, at 76-77 (discussing the effects of substance abuse on child development).

76. *Id.* at 77.

77. See, e.g., N.Y. CIV. SERV. LAW § 83.2 (McKinney 1999) ("The term significant risk of transmitting or contracting HIV infection includes . . . the gestation, birthing or breast feeding of an infant when the mother is infected with HIV.").

78. Michael L. Closen et al., *Criminalization of an Epidemic: HIV-AIDS and Criminal Exposure Laws*, 46 ARK. L. REV. 921, 961 (1994).

79. See, e.g., Closen, *supra* note 78, at 921; Mary Anne Bobinski, *Women and HIV: A Gender-Based Analysis of a Disease and its Legal Regulation*, 3 TEX. J. WOMEN & L. 7 (1994).

80. But see ARK. CODE ANN. § 5-14-123 (1987); 720 ILL. COMP. STAT. ANN. § 112-16.2 (West 1993) Ch. 38 ¶ 12-16.2; LA. REV. STAT. ANN. § 14:43.5 (1997); MO. ANN. STAT. § 191.677(1)(2) (2000). One example of extremely vague language in a state statute dealing with criminal exposure laws is Georgia statute § 17-10-15. "Significant exposure" is defined as:

criminalization of in utero HIV exposure, most statutes use vague language from which mother-to-child transmission can be included as violative of the statute.⁸¹ Only one state expressly prohibits the prosecution of HIV transmission from mother to child.⁸² This is particularly noteworthy because the choice to procreate has been determined by the Supreme Court to be a fundamental right.⁸³

Most statutes that criminalize HIV exposure have intent requirements.⁸⁴ Therefore, to convict mothers whose exposure to HIV of their children results in transmission, a prosecutor would have to prove that the intent of a woman's pregnancy was to cause death or serious bodily injury to her offspring. While this intent is difficult to prove, the analysis is altered as scientific progress allows for mothers with HIV to seek medical care, thus reducing the chance of transmission.⁸⁵

Breakthroughs in prenatal care have prevented some transmissions,⁸⁶ and the number of women receiving late or no prenatal care has declined.⁸⁷ Nevertheless, the same groups at greatest risk for HIV infection—minorities, the urban poor, and drug users—

contact of the victim's ruptured or broken skin or mucous membranes with the blood or body fluids of the person arrested for such offense other than tears, saliva, or perspiration, of a magnitude that the Centers for Disease Control have epidemiologically demonstrated can result in transmission of human immunodeficiency virus.

GA. STAT. § 17-10-15 (1997).

81. Closen, *supra* note 78, at 947.

82. OKLA. STAT. ANN. 21 § 1192.1 (2001).

It shall be unlawful for any person knowing that he or she has Acquired Immune Deficiency Syndrome (AIDS) or is a carrier of the human immunodeficiency virus (HIV) and with intent to infect another, to engage in conduct reasonably likely to result in the transfer of the person's own blood, bodily fluids containing visible blood, semen, or vaginal secretions into the bloodstream of another, or through the skin or other membranes of another person, except during in utero transmission of blood or bodily fluids.

Id.

83. *E.g.*, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992).

84. *See generally* Closen, *supra* note 78, at 924-34 (discussing intent requirements of criminal transmission laws).

85. Lynne M. Mofenson, *Can Perinatal HIV Infection be Eliminated in the United States?* 282 JAMA 6, 577 (1999) available at <http://jama.ama-assn.org/issues/v282n6/full/jed90057.html>. There are antiretroviral drugs that work to prevent the virus from reproducing and may help protect the fetus from contracting HIV from the infected mother. *Id.*

86. *Id.*

87. *Id.* ("While adolescent pregnancies have declined since 1991, there continue to be high pregnancy rates among minority adolescent women, the women most likely to be at risk of HIV infection.").

are least likely to receive prenatal care.⁸⁸ Fourteen percent of HIV-infected women giving birth did not receive prenatal care and twenty-three percent started care only during the third trimester of pregnancy.⁸⁹ Now that preventative measures exist, the question becomes whether women who fail to take these measures and receive adequate prenatal care could or should be found to have demonstrated a critical element of this crime—the intent to cause death or serious bodily harm—hence, should be prosecuted. As the probability of preventing transmission improves with adequate health care, prosecutors may be able to infer intent—or minimally, negligence—from a failure to get proper prenatal care.

D. A Mother's Duty to Her Fetus in Tort Law

Although this issue is receiving more attention because of the growing prevalence of drug addiction and HIV, prosecuting a mother for harming her child before birth is not new. In the past century, courts addressed a mother's duty to her fetus in a number of scenarios. However, these decisions have been inconsistent on the balancing of the rights of the mother with the rights of the fetus in the tort law context.⁹⁰ No steadfast rules exist regarding this legal issue.⁹¹

In *Stallman v. Youngquist*,⁹² the Illinois Supreme Court discussed at length its refusal to bring an action against a mother on behalf of a fetus. In *Stallman*, an infant brought an action against its mother for prenatal injuries sustained in an automobile accident.⁹³ The court did not recognize a cause of action brought by the fetus, subsequently born alive, against its mother for the unintentional infliction of prenatal injuries.⁹⁴ Although the court validated the right of the fetus to begin life with "a sound mind and body," it argued that asserting this right against the mother would have serious ramifications for women, families, and society.⁹⁵ The *Stallman* court concluded that a legal division of maternal and fetal rights could potentially jeopardize reproductive freedom.⁹⁶

88. *Id.*

89. *Id.*

90. Schmall, *supra* note 43, at 276 ("A fetus can sue in tort or be murdered by a third person—sometimes.")

91. *Id.*

92. *Stallman*, 531 N.E.2d 355 (Ill. 1988).

93. *Id.* at 355.

94. *Id.* at 361.

95. *Id.* at 359.

96. *Id.* at 359-61.

In *Stallman*, the court criticized previous cases holding a child's mother to the same standard of liability for negligent conduct resulting in prenatal injury as that to which a third person would be held. One such case, *Grodin v. Grodin*,⁹⁷ arose after a mother took tetracycline while pregnant, thus harming her fetus in utero. *Grodin* has been criticized for "hav[ing] . . . the law treat a pregnant woman as a stranger to her developing fetus for the purposes of tort liability."⁹⁸ The *Stallman* court criticized a position that would expose a woman to heightened liability simply for becoming pregnant, differentiating between the position of a third party tortfeasor, and a pregnant mother. It stated:

Holding a third person liable for prenatal injuries furthers the interests of both the mother and the subsequently born child and does not interfere with the defendant's right to control his or her own life. Holding a mother liable for the unintentional infliction of prenatal injuries subjects to State scrutiny all the decisions a woman must make in attempting to carry a pregnancy to term, and infringes on her right to privacy and bodily autonomy.⁹⁹

Exposing a woman to criminal or civil penalties would have serious ramifications, hence forcing her to subordinate her right to control her life when she becomes pregnant. The fetus and the mother would be forced into a status of legal adversaries unlike any traditional plaintiff and defendant relationship. Feminist criticism of such liability finds it a strain upon "our concepts of personal integrity to consider a woman as of no greater importance than as a fetal environment."¹⁰⁰

Proponents of the prosecution of mothers for behavior that affects the fetus in utero argue that maternal liability is no different than third party liability, and even more desirable because the mother is in such a controlling position, in terms of the health of the fetus.¹⁰¹ These people cite strong opposition to these cases as a form of "juvenile ageism."¹⁰² In his book, *Licensing Parents*, psy-

97. *Grodin*, 301 N.W.2d 869 (Mich. Ct. App. 1980).

98. *Stallman*, 531 N.E.2d at 360.

99. *Id.*

100. Schmall, *supra* note 43, at 273.

101. See generally Nova D. Janssen, *Fetal Rights and the Prosecution of Women for Using Drugs During Pregnancy*, 48 DRAKE L. REV. 741 (2000) (asserting that the government has the power to prevent pregnant mothers from using drugs through stricter criminal liability for these offenses).

102. See generally WESTMAN, *supra* note 6, at 123-48 (discussing the dynamics and forms of juvenile ageism).

chologist Jack Westman explains that the lack of parental accountability in the United States exists because of discrimination similar to racism and sexism.¹⁰³ This is because of children's lack of social, financial, and political power. He writes:

[T]he fact that unborn children need protection against the dangerous actions of their pregnant mothers is receiving increasing attention. The height of parental incompetence is seen when mothers damage their unborn babies by knowingly ingesting toxic substances during pregnancy and then neglecting their infants after childbirth with resulting additional physical and developmental damage.¹⁰⁴

This view supports maternal-fetus liability beyond that of third party tortfeasors.

II. THE GENDER CONFLICT

Perhaps the most striking facet of prosecuting mothers who harm their children in utero, or shortly after birth (as in cases of neglect involved with breastfeeding), is the disparity it creates in the treatment of men and women under the law. Because these cases can have only female defendants the question whether they are applied discriminatorily is moot—they can only be applied discriminatorily. This part of the Comment addresses controversies surrounding the scenarios presented in Part I, and explores possible male analogs. This section concludes with a comparison of male and female offenders, and their treatment in the criminal justice system.

A. The Practical Effect of Child Abuse Laws Applied to Women

1. *Breastfeeding*

In prosecuting mothers for activity directly involved with breastfeeding, society runs the risk of deterring women from breastfeeding. This is of particular concern given that breastfeeding rates are already steadily declining.¹⁰⁵ Prosecutors must strike a balance between encouraging breastfeeding and prosecuting mothers who do so improperly.

103. *Id.*

104. *Id.* at 76.

105. Shdaiman, *supra* note 16, at 442 (citing a study on patterns of breastfeeding by the World Health Organization).

If breastfeeding mothers are more sensitive to their child's needs,¹⁰⁶ the question becomes whether it is even a plausible argument that Tabitha Walrond did not realize her child was starving to death. According to this argument, Tabitha Walrond should have been hormonally programmed to identify her baby's malnutrition better than an ordinary observer, or even a non-breastfeeding mother. She was in the best position to identify and rectify the problem. Therefore, her prosecution for her son's death was the most effective way to deal with the situation.

Nevertheless, her failure to breastfeed adequately does not necessarily render her negligent under judicial standards of reasonableness as a reasonable person or a reasonable mother, but more specifically as a reasonable breastfeeding mother. Such a detail-specific inquiry as that of the reasonable breastfeeding mother would ultimately impose a greater duty upon mothers who choose to breastfeed than their bottlefeeding counterparts.

This argument suggests a stricter standard of care be imposed on mothers because of their unique biological relationship to the child. It follows that Tabitha Walrond, and women like her, whether or not intending to harm their children, fail, not simply as reasonable people, but also as nurturing mothers.

2. Drug Abuse

Approaching the epidemic of in utero drug exposure as a legal issue rather than a medical issue may hinder rather than aid prevention.¹⁰⁷ If the goal of laws directed at this issue is deterrence, prosecution of mothers for past harm to the fetus may not be the most effective vehicle. Prosecution deters mothers from seeking the appropriate healthcare because they run the risk of having their medical records turned over to prosecutors.¹⁰⁸ A study published in the *Journal of the American Medical Association* found states that approach drug use as a legal rather than health concern were the same states that offered limited resources for substance abuse treatment.¹⁰⁹

Further complicating this scenario is the fact that it is extremely difficult for pregnant women to receive appropriate drug rehabili-

106. *Supra* Part I.A.

107. Mofenson, *supra* note 86, at 578 (noting that criminalizing pregnant drug use may actually deter women from seeking prenatal care).

108. *See generally* Oberman, *supra* note 52, at 520-21 (discussing the ramifications of child abuse and neglect laws on pregnant drug users).

109. Mofenson, *supra* note 86, at 577.

tation during pregnancy.¹¹⁰ Waiting lists for drug treatment facilities prevent pregnant women from accessing the medical care they need immediately.¹¹¹ Also, many facilities refuse to accept pregnant addicts because it is not cost effective and creates increased liability due to the complications of prenatal care.¹¹²

Therefore, in most jurisdictions that criminalize in utero drug exposure, no help is available for the pregnant woman. She is left with two choices: obtain medical care at the risk of having a physician report her drug use to the state and face possible prosecution,¹¹³ or receive no drug treatment or prenatal care and subject her baby to the risk of serious defects.

3. HIV Transmission

"Although the transmission of HIV from woman to child is unique, some of the behaviors which create the risk of HIV transmission from woman to child are engaged in by either gender."¹¹⁴ For example, a pregnant woman who has sex with an HIV-infected man puts her fetus at risk of exposure. But that HIV-infected man is also putting the fetus at risk. However, due to the ambiguity of the intent requirements in laws that criminalize transmission, only a woman who does not know she is infected when she gets pregnant, or does not realize she is pregnant and thus does not take proper medical precautions to decrease the risk of transmission, could be prosecuted simply for giving birth.¹¹⁵

The complexity of the problem, particularly the intent requirements (in light of medical advances), the constitutional issues regarding procreative freedom, and the economic and social problems caused by the disease render an appropriate balance within the law difficult to achieve. Regulation of behaviors that present a risk of HIV transmission benefits women, but regulation through the criminal law or tort systems constitutes yet another

110. See Moss, *supra* note 7, at 297 (noting examples of hospitals refusing to treat pregnant drug addicts).

111. Chan, *supra* note 63, at 208-09.

112. Oberman, *supra* note 52, at 515-16. Statistics reflect the significant difficulty for pregnant women face in accessing adequate drug treatment. *Id.* at 516.

113. *Id.* at 520. This could result in possible jail time for the remainder of the pregnancy, thus exposing the baby to further risks. Lisa C. Ikemoto, *The Code of the Perfect Pregnancy: At the Intersection of the Ideology of Motherhood, The Practice of Defaulting to Science, and the Interventionist Mindset of the Law*, 53 OHIO ST. L.J. 1205, 1250 (1992).

114. Bobinski, *supra* note 79, at 34.

115. *Id.*

example of punishing the mother who fails to fit the mold of nurturing mother.

B. Inherently Male Offenses—Is There Such a Thing?

Because of the unique physical relationship of a woman to her baby, most comparisons of cases involving in utero drug exposure or failure to adequately breastfeed to cases that only have male defendants—"inherently male" cases—falls short. This section analyzes situations where the father's relation to the child is most similar to that of the mother in the line of "inherently female" cases, and examines how the law treats these cases. Three such scenarios are drug use by men that affects sperm, domestic abuse, and custody of fertilized eggs for in vitro fertilization after a divorce proceeding. The law treats these cases by either recognizing male procreative rights or increasing maternal duties.

1. Drug Use

Drug use by men adversely affects sperm.¹¹⁶ Although studies have shown drug use by men affects reproduction, "[m]en are not, and most likely will never be, arrested for child abuse after having used morphine or methadone, substances which animal studies have revealed will affect sperm."¹¹⁷ Under the law, the man and the child are treated as distinct and separate entities from the time of conception, and are therefore not placed in the same legal conflict as the mother and the fetus.¹¹⁸

Additionally, some states hold drug use by pregnant women to be a presumptive finding that the child will be neglected after birth.¹¹⁹ No such presumption is employed with regard to the father.¹²⁰ Therefore, what appears to be a similar situation is in fact treated differently in the judicial system.

2. Domestic Violence

Domestic violence is both a family issue and a gender issue. Although domestic violence can be perpetrated by either gender, "[t]here is no known human society in which the level of lethal

116. Moss, *supra* note 7, at 286.

117. *Id.*

118. *Id.*

119. *Id.* at 291-92.

120. *E.g.*, Schmall, *supra* note 43, at 285. "Men are not arrested for child abuse or prosecuted for neglect after having used illegal drugs which are known to adversely affect sperm." *Id.*

violence among women even begins to approach that among men.”¹²¹ Male violence, both within the family unit and in society as a whole, greatly surpasses that of female violence.¹²² In situations of violence between intimates, the male is commonly the perpetrator, and the female the victim. However, child abuse is traditionally regarded as a female crime.¹²³ This perception of the male as the perpetrator of domestic violence, and the female as the perpetrator of child abuse ignores any correlation between domestic violence and child abuse.¹²⁴

The perception of child abuse as a predominantly female crime is inaccurate. Research indicates that fathers may be as likely or more likely than mothers to abuse their children.¹²⁵ Furthermore, men’s abuse of children often results in more serious injuries to children.¹²⁶ This misperception of the problem results in an overall failure to adequately address child abuse by men.¹²⁷

Recently, scholars have taken notice of the absence of men from the traditional analysis of child abuse. Scholars attribute this “male invisibility” to the lack of research on the subject of male child abuse and the failure of support programs for abusive parents to focus on both parents, rather than simply on mother-child bonding.¹²⁸

Although this issue is receiving more scholarly attention, the judicial system has thus far failed to address the new findings. This is evidenced by “failure to protect statutes” that prosecute the passive partner (most often the female partner) in a domestic violence situation.¹²⁹

121. CORAMAE RICHIE MANN, *WHEN WOMEN KILL* 2 (1996) (citing M. DALY & M. WILSON, *HOMICIDE* 146 (1988)).

122. *Id.*

123. Michelle S. Jacobs, *Requiring Battered Women Die: Murder Liability for Mothers Under Failure to Protect Statutes*, 88 J. CRIM L. & CRIMINOLOGY 579, 593-94 (1998).

124. Maureen Halpern, *Is a Battered Mother who Does Not Leave the Abusive Relationship a Neglectful Parent?*, INTERDISCIPLINARY REPORT ON AT-RISK CHILDREN & FAMILIES, Jan./Feb. 1999, at 83 (discussing evidence that overwhelmingly shows the link between domestic violence and child abuse) (citations omitted).

125. Ashe, *supra* note 10, at 87-88.

126. *Id.*

127. Jacobs, *supra* note 123, at 594; The “Failure to Protect” Working Group, *Charging Battered Mothers with “Failure to Protect”: Still Blaming the Victim*, 27 FORDHAM URB. L.J. 849 (2000) (discussing the current status of “failure to protect” statutes).

128. *Id.* at 594-95.

129. *Id.* at 595.

Both parents have an affirmative duty to their children.¹³⁰ Therefore, when parents fail in this duty, the law can hold them criminally liable.¹³¹ Although this duty runs to both parents, mothers are more likely than men to be held liable when the child's needs are not met.¹³² In cases where a male intimate of a mother (whether the father of the child or not) abuses a child, the mother can be held liable based on her failure to protect the child from abuse.¹³³ However, when the gender roles are reversed, the father is rarely held liable for a similar omission.¹³⁴

Society is particularly unwilling to excuse a mother who "allows" her child to be abused, even if the mother is a victim of battering herself.¹³⁵ Often, she lacks the financial or emotional resources necessary to leave an abusive situation.¹³⁶ However, "[c]ourts have been reluctant to excuse the mother's failure to save the child from abuse on the grounds that she herself has been abused."¹³⁷ Courts interpret failure to protect laws as strict liability laws, so regardless of how badly battered physically or emotionally a mother is, she has an affirmative duty to protect her child from her abuser.¹³⁸ Further, failure to protect laws, although written in gender neutral terms, are applied overwhelmingly to women.¹³⁹ "Courts hold

130. *Id.* at 587 ("Both parents have a duty to clothe and feed their children and maintain basic necessities. The parental duty to the child is at least, theoretically, not without limit.").

131. *Id.*

132. Roberts, *supra* note 8, at 96.

133. See generally Somini Sengupta, *Tough Justice: Taking a Child When One Parent is Battered*, N.Y. TIMES, July 8, 2000, at A1 (discussing situations where a mother is charged with child neglect when her male intimate abuses her child); see also Jacobs, *supra* note 123, at 621-45 (discussing evolution and rationale behind punishing omissions by the non-aggressive party from removing the child from the abusive environment); The "Failure to Protect" Working Group, *supra* note 127, at 854 (asserting that the current standard for making a neglect finding based upon a parent's failure "to exercise a minimum degree of care and that failure results or will result in physical, emotional or psychological impairments to the child" is actually applied as a strict liability statute).

134. Jacobs, *supra* note 123, at 583-84 (comparing the case of Pauline Zile, a woman convicted for first degree murder and sentenced to life in prison when her child died at the hands of her husband, with the case of a man whose wife murdered his child who not only was found to have no duty to protect, but was met with a sympathetic reaction from the public).

135. *Id.* at 583.

136. *Id.*

137. *Id.* at 585.

138. *E.g.*, N.Y. FAM. COURT ACT § 1012 (McKinney 1998); In the Matter of Glenn G., 587 N.Y.S.2d 464 (N.Y. Fam. Ct. 1992); The "Failure to Protect" Working Group, *supra* note 127, at 854.

139. Jacobs, *supra* note 123, at 618.

mothers responsible for violence in the family. Society considers child abuse a failure of a mother's natural capacity to nurture and protect."¹⁴⁰ The biased application of failure to protect statutes perpetuate the myth that child abuse cases, even when the perpetrator is male, are ultimately the fault of the female.

These cases emphasize the exaggerated duties of mothers and perpetuate the acceptability of the detachment of fathers from their offspring. In theory, cases of child abuse by males could be compared with inherently female abuse cases like in utero drug or alcohol exposure because in both cases, a parent is acting affirmatively to harm his or her child. Arguably, in cases of physical child abuse there is a more direct causal link because the harm is visible immediately. Unlike drug abuse, physical abuse is not based in addiction. When someone strikes a child, the damage, whether it be bleeding or simply the child crying out, is immediate. However, damage done to a child in utero is seen months and sometimes years after the harmful behavior occurred. Also, in physical child abuse the physical harm runs only to the child, whereas in in utero drug exposure, the mother is inflicting harm on herself as well as her child.

However, the analogy falls short because these cases merely result in an extension of duties assigned to the mother. The passive father who allows his female partner to use crack, or even provides her with the drug, is not prosecuted under negligence or failure to protect statutes, whereas a mother who is battered and tormented by her abuser is subsequently held liable for his action.

3. *In Vitro Fertilization*

Arguably, a woman has greater duty to her children because she has more rights than her male counterpart.¹⁴¹ This argument is most often seen in custody cases, where the "best interest of the child" standard is often interpreted to mean "in the custody of its mother."¹⁴² However, the rights of the father in custody cases are expanding. One such example is the question of who retains custody of the fetus for in vitro fertilization after a man and woman separate. For example, *Davis v. Davis* dealt with the ownership rights of fertilized embryos after a divorce proceeding.¹⁴³ In this case, Mrs. Davis wanted the frozen embryos donated to another

140. Roberts, *supra* note 8, at 110-11.

141. See *id.* at 96-98, 98 n.17.

142. *Id.*

143. 842 S.W.2d 588 (Tenn. 1992).

couple, while Mr. Davis wanted them destroyed.¹⁴⁴ The court weighed the interest of both parties, and rejected the idea that a female has a greater interest and therefore should be vested with control of the frozen embryos.¹⁴⁵ The court attempted a gender-neutral analysis, finding the male and female interest in the frozen embryos equal.¹⁴⁶ The court said:

None of the concerns about a woman's bodily integrity that have previously precluded men from controlling abortion decisions is applicable here. We are not unmindful of the fact that the trauma (including both the emotional stress and physical discomfort) to which women are subjected in the IVF process is more severe than is the impact of the procedure on men. In this sense, it is fair to say that women contribute more to the IVF process than men. Their experience, however, must be viewed in light of the joys of parenthood that is desired or the relative anguish of a lifetime of unwanted parenthood. As they stand on the brink of potential parenthood, Mary Sue Davis and Junior Lewis David must be seen as entirely equal gamete-providers.¹⁴⁷

In recognizing the equality of both partners in the decision to become parents, the court upheld Junior Lewis Davis' rights.¹⁴⁸ Here, a court used the application of a gender-neutral standard to advance the interest of the male partner.

The treatment of male drug use, domestic abuse, and custody cases exemplifies the difference in the perception of motherhood and fatherhood. Interestingly, these cases most resemble the inherently female line of cases when the father's *rights* in the child are at issue, rather than his *duties* to the child. As was the scenario in *Davis*, the court applied a gender-neutral standard to recognize the rights of the father.¹⁴⁹ Similarly, when imposing an affirmative duty on a parent, although the statutes are written using the pronoun "he" as a neutral term for any "parent, guardian or other

144. *Id.* at 590.

145. *Id.* at 590-91 (rejecting the "sweat-equity" model, that a woman has a greater interest in the embryos because of her "greater physical and emotional contribution to the IVF process").

146. *Id.* at 598 n.21. "[I]f the roles were reversed in this case, it is highly unlikely that Junior David could force the preembryos to Mary Sue over her objection. Because she has an absolute right to seek termination of any resulting pregnancy, at least within the first trimester, ordering her to undergo a uterine transfer would be a futility." *Id.*

147. *Id.* at 601.

148. *Id.* at 604.

149. *Id.*

person supervising the welfare of a child,"¹⁵⁰ most courts fail to apply these laws as such.¹⁵¹ Rather, courts are more likely to read the word "parent" in a statute as "mother."¹⁵²

C. Characteristics of Abusers

Although the criminal justice system treats male and female child abuse offenders very differently, there are many similarities between male and female abusers. The typical child abuser has numerous problems including a negative self-image, little or no social support system, and a lack of financial resources.¹⁵³ There is also a strong correlation between drug use and neglect and abuse.¹⁵⁴ In a 1997 study, eighty-eight percent of social work professionals surveyed found substance abuse as one of the top two problems in families reported for child mistreatment.¹⁵⁵ In addition, abuse occurs continually, rather than in isolated instances.¹⁵⁶ If a child is abused, he or she is likely to be abused more than once.¹⁵⁷

While personal characteristics of abusers seem to cross gender lines, the characteristics of the actual instances of abuse diverge along gender lines. This is most visible in statistics dealing with child homicide. Women who kill their children often do so in ways in which a clear intent to kill can be inferred, like poisoning, but men often kill their children by means of a violent, but ambiguous,

150. MODEL PENAL CODE § 230.4 (Proposed Official Draft 1962).

A person is guilty of endangering the welfare of a child when . . . 2. [b]eing a parent, guardian, or other person legally charged with the care or custody of a child less than eighteen years old, he fails or refuses to exercise reasonable diligence in the control of such child to prevent him from being an 'abused child' [or] a 'neglected child'

N.Y. PENAL LAW § 260.10 (Consol. 2000).

151. Jacobs, *supra* note 123, at 618 (discussing gender biases in the enforcement of failure to protect laws); The "Failure to Protect" Working Group, *supra* note 127.

152. *Id.* "Women are overwhelmingly prosecuted under these statutes because they are deemed to have primary caretaking responsibilities for the children [B]ecause men are increasingly more likely to be the actual perpetrators of the violence, women are left to prevent the violence." *Id.*

153. ANIA WILCZYNSKI, CHILD HOMICIDE 72, 82 (1997).

154. PREVENT CHILD ABUSE AMERICA, CHILD ABUSE AND NEGLECT STATISTICS (1998), at <http://www.childabuse.org/facts97.html> (last visited Oct. 22, 1999) (on file with the Fordham Urban Law Journal).

155. *Id.*

156. See generally PREVENT CHILD ABUSE AMERICA, AN APPROACH TO PREVENTING CHILD ABUSE, http://www.preventchildabuse.org/research_ctr/fact_sheets/an_approach_to_prevention.html (last visited Jan. 11, 2000) (discussing cyclical patterns of child abuse) (on file with the FORDHAM URBAN LAW JOURNAL).

157. *Id.*

act like beating the child to death.¹⁵⁸ Thus, when a man kills his child, it is often done in an abusive attack meant to harm, not necessarily kill, the child.¹⁵⁹ Therefore, intent is not as easy to identify as with the passive mother who poisons her child.¹⁶⁰

D. Treatment of Abusers in the Criminal Justice System

Gender differences are not only visible in the crimes committed by men and women, but also in their treatment by the criminal justice system.¹⁶¹ Sentencing differences exist along gender lines.¹⁶² A woman's role in a family often determines the criminal sentence the court will impose on her, whereas a man's role in a family is not a determinative factor at sentencing.¹⁶³ Arguably, "[t]he effect of a woman's sentence on her family, especially her children, is weighed more heavily than its effect on the woman herself."¹⁶⁴ However, this is only applied to the woman who adheres to the traditional role of mother.¹⁶⁵ Dorothy Roberts, a feminist scholar, writes:

Although the law treats mothers who commit general crimes relatively leniently so that they may fulfill their traditional role, it treats women who commit crimes as mothers the harshest for violating the traditional role. The criminal justice system punishes female defendants according to the extent to which their acts deviate from appropriate female behavior.¹⁶⁶

Considering how this analysis of the mother as the "good mother" or the "bad mother" is used in the sentencing process, it is not surprising that the identity of the woman and her adherence to society's motherhood model plays a central role at trial. For example, in the Walrond case, the defense tried to portray Ms. Walrond as a victim, an acceptable female role worthy of sympathy, while the defense tried to depict her as a social deviant requiring punishment.¹⁶⁷

158. MANN, *supra* note 121, at 69-79 (discussing female patterns of child homicide).

159. WILCZYNSKI, *supra* note 153, at 64.

160. *Id.*

161. MANN, *supra* note 121, at 128 (discussing study which found "a few of the predicted variables were significantly associated with the assignment of a prison sentence—unemployment, prior arrest history, 'region,' gender of the victim").

162. Roberts, *supra* note 8, at 103.

163. *Id.*

164. *Id.*

165. *Id.* at 107.

166. *Id.*

167. Bernstein, *supra*, note 4, at B7.

III. RECONSTRUCTING THE PERCEPTION OF THE FEMALE OFFENDER THROUGH A GENDER-NEUTRAL APPROACH TO CHILD ABUSE LAWS

A. Expectations of "The Good Mother"

It is not unusual that stereotypical gender roles, particularly the female role of mother, are so ingrained in the criminal law given the pervasiveness of stereotypical gender roles throughout our culture.¹⁶⁸ Gender expectations infiltrate every aspect of life, so much so that from the time they are little girls, women are assigned the role of mother.¹⁶⁹ Little girls are given dolls to teach them responsibility in caring for others and fostering their nurturing, maternal instincts. Little boys, on the other hand, are immersed in sports and activities that focus upon individual ability and achievement.

In her analysis of gender roles in early adolescence, journalist Peggy Orenstein writes about a teacher who asked her sixth grade students to imagine that everything in their lives was the same only they were born the opposite sex.¹⁷⁰ The responses of the students reflected gender roles deeply ingrained in society.¹⁷¹ Orenstein writes, "[A]lmost all of the boys' observations about gender swapping involve disparaging 'have-to's whereas the girls seem wistful and longing. By sixth grade, it is clear that both girls and boys have learned to equate maleness with opportunity and femininity with constraint."¹⁷²

These constraints and "have-to"s emerge from society's definition of women as mothers or potential mothers and present a paradox to many feminists.¹⁷³

A woman's status as childbearer determines her identity. Society assigns women the enormous responsibility of childrearing. Society not only does not pay women for this labor, but it degrades it as well. To the extent society values women's role as mother, it does so only when the events of motherhood attach it to a legal father. Despite this fact, no woman achieves her full position in society until she gives birth to a child.¹⁷⁴

168. Roberts, *supra* note 8, at 11.

169. *Id.* at 96-97.

170. PEGGY ORENSTEIN, *SCHOOLGIRLS: YOUNG WOMEN, SELF-ESTEEM AND THE CONFIDENCE GAP* xiii-xiv (1994).

171. *Id.*

172. *Id.*

173. Roberts, *supra* note 8, at 96-97.

174. *Id.* at 96.

Whether the constraints of motherhood emerge solely from biology or from a combination of biology and social norms, this perception is so indelibly etched in our social structure that it is unlikely to change. Feminist scholars have recently attempted to reconcile the concept of mother with that of the liberated woman only to find that mothers are still seen as caretakers of children rather than full human beings in and of themselves.¹⁷⁵

"Mothers are rarely associated with resentment, erotic pleasure, or, especially, violence."¹⁷⁶ In her book, *When Women Kill*, Coramae Richey Mann writes that few Americans associate violence with females, or with the public conception of violence as a national problem.¹⁷⁷ However, women do commit crimes, and it is the woman who is simultaneously the mother and the criminal that society finds most repulsive and enigmatic. Society attempts to understand this idea by categorizing the female criminal in one of two ways: an evil person or a victim. Never was this more clear than in the trial of Tabitha Walrond.

B. The Bad Mother

The concept of the evil mother has been around as long as the concept of motherhood. The evil mother plays a predominant role in the fairy tales and literature of Western culture.¹⁷⁸ One feminist author describes the bad mother in Western fairy tales as:

[S]o split off from the normal reality of "good motherhood" that she is characterized as the bizarre or crazy persona—the "mad-woman" consigned to "the attic" of deviance or marginality. The "bad mother" is depicted as the figure always threatening to exceed, to violate the norms that prescribe the boundaries and scope of her duty. Her boundary violations have tragic consequences for her community by inviting destruction upon all its members.¹⁷⁹

In fairy tales, this bad mother is often a stepmother, lacking the nurturing and maternal characteristics of biological mothers.¹⁸⁰ She is the non-traditional woman who has not fulfilled her role as mother in the natural sense, and thus wreaks havoc on the lives of innocent children.¹⁸¹

175. *Id.* at 102.

176. Ashe, *supra* note 10, at 82.

177. MANN, *supra* note 121, at 2.

178. Ashe, *supra* note 10, at 80.

179. *Id.* at 81.

180. *Id.*

181. *Id.*

Today's social perception of bad mothers is not the evil step-mother, but the single, urban, minority woman.¹⁸² "Society . . . stigmatizes unwed mothers, unfit mothers, and women who do not become mothers for violating the dominant norm."¹⁸³ These women are perceived as deviant or criminal.¹⁸⁴ One case emphasizing society's discomfort with this population is *Chambers v. Omaha Girls Club, Inc.*¹⁸⁵ In *Chambers*, a woman was dismissed from her employment when she became pregnant because the pregnancy allegedly set a poor example for the young women who went to the club.¹⁸⁶ The court ignored the fact that Chambers chose to keep her child and work hard to raise it, and, additionally, that the father of the child took no responsibility for it.¹⁸⁷

By categorizing good mothers and bad mothers, society is able to exert control over women.¹⁸⁸

Legal rules reward conduct that fulfills a woman's maternal role and punish conduct that conflicts with mothering Women who do not fit the norm of the ideal mother—single and divorced women, women with children in foster care, women of color, working class and poor middle class women—require harsher treatment and are more dispensable.¹⁸⁹

Punishing these mothers' for non-maternal conduct enforces gender roles as much as it protects children.¹⁹⁰

Tabitha Walrond, mothers addicted to cocaine, and mothers with HIV who choose to procreate fail to fit the role of nurturing mother. Thus, these women are treated quite differently from other offenders in the criminal justice system. It is easier to label them as bad mothers, disposing of them and their children, than to reformulate an approach to the distinct problem of inherently female child abuse offenses.

C. A Gender-Neutral Approach

Under the law, parental rights and duties are equivalent for mothers and fathers.¹⁹¹ However, mothers are instilled with

182. Roberts, *supra* note 8, at 105-06.

183. *Id.* at 98.

184. *Id.*

185. 834 F.2d 697 (8th Cir. 1987).

186. *Id.* at 698-99.

187. *Id.*

188. Roberts, *supra* note 8, at 98.

189. *Id.* at 97, 105.

190. *Id.* at 98.

191. Jacobs, *supra* note 123, at 588.

greater responsibility for caring for children. This greater responsibility is accompanied by increased liability. While feminist scholars debate whether this is a by-product of biology or society, the fact remains that women are treated differently by the law because of their role as mothers.

Nowhere is this more evident than in child abuse and neglect cases that are inherently female. The current system of approaching these issues has placed the mother in conflict with her fetus, and subsequently, her child. Even when these cases have a somewhat similar male analog, the laws are facially neutral but are applied overwhelmingly toward females.

A better way to approach these cases would be to step back from such a gender-specific inquiry, and take a gender-neutral view of these inherently female offenses. Although this may seem counter-intuitive, an actual gender-neutral analysis may help provide a stronger basis for dealing with these problems.

If society is to view women beyond the role of mother, the judicial system needs to broaden the scope of its inquiry. Rather than prosecuting women for failing to adhere to the feminine ideal, we must prosecute them as we do men, for failing to adhere to the laws and rules of society under an objective standard. Yet in inherently female cases we seem to do the opposite. In the Walrond case, Ms. Walrond was judged for her ability as a mother, rather than for the result of her wrong—the death of her baby.

This does not mean that women who expose their children to drugs in utero, or neglect their children to the point of malnourishment, would go unprosecuted. Rather, it would look at the actual danger and reasonableness of the offense. For example, it is not reasonable to believe that exposure to crack cocaine when pregnant will not harm the fetus. Nor is it reasonable that a mother, who is the primary caregiver of the child, and is solely responsible for feeding it through her breastmilk, would have no liability when the child dies from starvation—especially given the visual signs of starvation he showed in his last weeks of life. However, a reasonable person could believe that a seventy percent chance that a child will be born healthy to an HIV infected mother is a worthwhile risk. Rather than jumping to conclusions about who the mother is, and where she fits along the spectrum of “good” and “bad” mothering, her choices and conduct must be analyzed as that of a reasonable person with the capacity to make choices about her procreative freedom.

Federal and state judicial systems should develop a list of factors to aid them in this inquiry. Factors to be considered should include: (1) when the offense was committed; (2) how the offense was committed (whether passively or actively); (3) the intent; (4) the causal connection between the activity and the harm incurred; and (5) the role of the passive parent in the action.

Under this standard, cases like that of Tabitha Walrond, and those of women who exposed their children to drugs in utero, will still be prosecuted without an identical male corollary. A gender-neutral analysis will not eliminate the gender disparity in child abuse offenses, but it will reduce it by stressing the behavior, rather than the person engaging in the behavior. It will reduce the level at which we condemn the female for not conforming to society's perception of the feminine ideal.

Additionally, when there are corollary male cases, the law should address the male defendants rather than creating additional female duties. For example, if prosecuting the passive parent in a domestic abuse situation is acceptable, the passive male partner of a pregnant woman addicted to crack cocaine should not be exempt from liability. The fifth factor reflects the role of both parents by looking at the role of the passive parent. If it is reasonable to expect a mother to remove her child from a physically abusive partner, it is just as reasonable to have expected Tyler Walrond's father to intervene and feed his starving baby. It follows that if a mother is presumed to be a negligent parent because she has a history of drug abuse, it is a reasonable presumption that a father with a history of drug abuse also will be a potential danger to his child.

Arguably, the issues in the inherently female cases are so gender specific that a gender-neutral approach may oversimplify the solution to this problem. However, the current subjectivity of the system is often cited as the reason legislation targeted at pregnant mothers is a potentially dangerous thing.¹⁹² How do we prosecute the pregnant mother who did not know she was pregnant for several months of her pregnancy, or the mother who breastfeeds and is hormonally attached to her child, and who therefore should be better suited to respond to his cues of hunger? To create such a subjective standard would be nearly impossible.¹⁹³

In using a subjective approach the court would be forced to look at whether the pregnancy was planned or unplanned, whether a woman knew she was pregnant soon after conception, or only

192. *E.g.*, Stallman v. Youngquist, 531 N.E.2d 355, 360 (Ill. 1988).

193. Schmall, *supra* note 43, at 305-06.

knew after several months, whether she had the financial resources to access the best medical care available or was unable to get any prenatal care.¹⁹⁴ Similarly, after the child is born, it would be necessary to hold breastfeeding mothers to a higher standard considering studies that have shown "a breastfeeding mother has a biologically programmed advantage over a bottlefeeding mother."¹⁹⁵ Such judgments do not make better, more effective law enforcement of child abuse. Rather, they only succeed in further ingraining already pervasive stereotypes.

A superior approach is one that balances the gender-neutral analysis without discounting the unique female aspects of the situation. This can be achieved through education of parents and professionals. If women know risks inherent in their activity while pregnant or breastfeeding, they are more likely to treat those risks reasonably. Similarly, if men are held accountable for their offspring, they will be more active in parenting.

Additionally, counseling sentences that recognize the inadequate prenatal care available to poor pregnant women approach this balance. Counseling sentences are only successful when there are programs available to pregnant women. Drug treatment facilities must not be allowed to continually turn away pregnant women.¹⁹⁶ "Forcing alcohol and drug treatment programs to admit pregnant women will allow women who seek help for their addiction receive it."¹⁹⁷ It will also provide a basis for prosecutors to determine whether the addicted woman acted reasonably.

A system that overwhelmingly exposes women to subjective standards of "good" and "bad" motherhood perpetuates gender stereotypes. A system of prosecuting offenses rather than offender by looking at the factors set forth above, and educating parents to prevent abuse and neglect, would diminish gender stereotypes within the judicial system. This approach focuses on responsibility, rejecting the perpetuation of gender stereotypes in society as a way of shifting blame in cases of child maltreatment. Ultimately, an objective gender-neutral approach to inherently female child abuse offenses will succeed in "releas[ing] motherhood from an institution that negates women's selfhood . . . by redirecting those

194. *Id.*

195. Hofheimer, *supra* note 21, at 440.

196. Moss, *supra* note 7, at 297.

197. *Id.*

mothers whose reactionary acts perpetuate the current oppressive regime of motherhood and child abuse.”¹⁹⁸

CONCLUSION

The judicial system must reassess its treatment of the female child abuse offender. A gender-neutral approach should be adopted in order to guarantee the prosecution of crimes that pose a severe harm to their vulnerable young victims, without criminalizing “bad” motherhood. This approach focuses on the crime rather than the criminal, the action rather than inaction, and parenthood rather than motherhood.

198. Roberts, *supra* note 8, at 141.

